86-1078

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

December Term, 1986

NO.

DANIEL GOICHMAN, Petitioner

v.

DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the State of California waive its sovereign immunity by filing an answer and participating in the case and agreeing the Court had jurisdiction?

2. Where only injunctive relief is sought, must an officer of the State be named in lieu of the State?

3. Did the State of California deny due process by requiring only the registered car owners to pay all outstanding tickets, otherwise their car registrations would not be renewed?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	ii
OPINIONS OF THE COURT BELOW.....	2
JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
THE REASONS FOR ALLOWING CERTIORARI.....	7
ARGUMENT.....	8
I. WHERE THE STATE ADMITTED IN ITS ANSWER, ITS BRIEF, ITS JOINT PRE-TRIAL STATEMENT, AND PARTICIPATED ON THE MERITS, THE STATE ENTERED A GENERAL APPEARANCE AND WAIVED ITS 11TH AMENDMENT IMMUNITY.....	8
II. SINCE ONLY INJUNCTIVE RELIEF AND DECLARATORY RELIEF WAS SOUGHT, SUIT COULD BE BROUGHT AGAINST THE STATE ACTING THROUGH ITS AGENCY (THE DMV)..	10
III. A STATE CANNOT CONDITION REGISTRATION OF MOTOR VEHICLES UPON PAYMENT OF BAIL FOR TRAFFIC TICKETS.....	11
IV. THE STATE SHOULD HAVE A PROCEDURE WHEREBY A CAR OWNER CAN EXPLAIN TO THE DMV THAT A TICKET HAS BEEN PAID, OR IS NOT HIS, ETC., IN ORDER TO GIVE THE PROCESS THAT IS DUE.....	12
CONCLUSION.....	13
EXHIBIT "A" - COPY OF OPINION BELOW	
EXHIBIT "B" - ORDER AND JUDGMENT	

TABLE OF AUTHORITIES

PAGE

Cases:

Bashir v. Supreme Court of Ohio, 501 F.Supp. 288, 290 (SD Ohio WD 1980), aff'd 652 F.2d 642 (6th Cir. 1981)... 10,11

Clark v. Barnard, 108 U.S. 436, 447, 448, 27 L.Ed. 780, 785, 2 S.Ct. 878 (1883)..... 8

Great Lakes Inter-Tribal Council, Inc. v. Voight, 309 F.Supp. 60, 64 (WD Wis. 1970)..... 10

Jones v. State of Mich., 525 F.Supp. 636, 638, 639 (ED Mich. 1981) aff'd, 705 F.2d 454 (5th Cir. 1982)..... 10

Papsan v. Allain, 106 S.Ct. 2932, 2941 (1986)..... 7

School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59, 63 (4th Cir. 1956)..... 10

Sutton v. City of Milwaukee, 521 F.Supp. 733, 739 (ED Wis. 1981) modified, 672 F.2d 644, 648 (7th Cir. 1982)..... 11,12

United States v. Vertol, 545 F.2d 648, 651 (9th Cir. 1976)..... 11

Statutes:

Government Code (Cal.) §945..... 7

28 U.S.C., Sec. 1253..... 2

Art. 3, §5, California Constitution..... 7

Cal. Code of Civil Procedure §1014..... 9

Cal. Vehicle Code §4760..... 2

Texts:

36 CJS Fed. Cts. Inj. Rel. §50(2), p. 257. 10

36 CJS Fed. Cts. Inj. Rel. §50(2), p. 259. 10

36 CJS Fed. Cts. §50(1)..... 10

72 Am Jur.2d, States, Etc., §115, p. 504.. 10

Opinions Below

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1986

NO.

DANIEL GOICHMAN, Petitioner

v.

DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, DANIEL GOICHMAN, respectfully prays that a writ of certiorari issue to review the judgment of the United States of Appeal for the Ninth Circuit in the above cause.

OPINIONS OF THE COURT BELOW

The opinion and order of the United States Court of Appeals for the Ninth Circuit is dated September 23, 1986, and is attached hereto as Exhibit "A". The Order and Judgment of the District Court dated July 30, 1985, is marked Exhibit "B" and attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals is subject to review by this Court by way of certiorari under Title 28, United States Code, Section 1253.

STATEMENT OF THE CASE

A complaint was filed by Daniel Goichman against the Department of Motor Vehicles of the State of California asking that Section 4760 of the Vehicle Code be declared unconstitutional.

That section requires that before a person be granted renewal registration of his vehicle, he pay all outstanding tickets (put up bail for them).

No procedures were established to insure that the tickets were actually the tickets of the registrant. The DMV exercised no discretion. Either the bail was put up, or no registration.

No similar burdens were imposed upon lease-ownership arrangements.

There was no easy way for one unjustly charged with 5 or 10 tickets in different parts of the State to remove same from prepaying of bail at the peril of non-registration unless he fought each ticket with each court in the various parts of the State.

Tickets that had been paid, tickets with the wrong numbers, tickets through clerical mistakes, tickets through computer mistakes, all had to be paid or

one would have to go without his registration. Even if one's car were stolen and there was a string of tickets throughout the State, the DMV still required payment since there was no procedural due process afforded by the DMV or the California law.

There was the substantive argument whether the State could subject private ownership to being deprived of such ownership unless civil penalties were paid by way of the registration procedures.

While a car owner was still subjected to the fines and penalties pertaining to the ticket, he was now also subjected to the "added" penalty of loss of the right to use his motor vehicle unless he prepaid his bail without any process being otherwise available.

The State of California answered the complaint and in paragraph 1 stated, "Admits that the Court has jurisdiction

over this action."

The parties then drew up a Pre-Trial Conference Order in which the State agreed, "The Court has jurisdiction under Title 28 U.S.C., Section 1343(3) & (4)." The State and the Plaintiff then set forth a 9 page statement of facts. The statement in paragraph 8 sets forth, "The following issues of law, and no others, remain to be decided at the time of trial: . . ." There was no question reserved as to the State being subject to suit.

The parties had engaged in pre-trial discovery, including extensive depositions.

On May 16, 1985, the State filed a motion for summary judgment which Plaintiff opposed. In the motion no claim was made by the State for immunity under the 11th Amendment. It argued the merits fully. The U.S. District Court granted

summary judgment stating only in its formal order that the State was entitled to prevail as a matter of law. No legal discussion was made.

Plaintiff took an appeal to the Court of Appeals for the Ninth Circuit. The State in hits brief, Headnote One stated: "The 11th Amendment does not preclude appellant from maintaining this case insofar as he is seeking declaratory and injunctive relief."

In spite of what concessions the State made, the Court of Appeals dismissed the case on the grounds that the State was immune from suit under the 11th Amendment and there was no waiver. Without discussing the merits, the Court of Appeals in footnote one stated, "we would almost certainly find little merit to appellant's position." A petition for rehearing was not filed.

THE REASONS FOR ALLOWING CERTIORARI

The Court of Appeals has decided a question of state immunity completely opposed to the law, clearly indicating the lack of clarity and uniformity in this area.

A State can, and did in this case, waive its 11th Amendment rights both expressly and by entering a general appearance.

There is also a need to follow the substance of the case and if only injunctive or declaratory relief is sought, a state ought to be allowed to be sued directly without camouflaging it with a suit against the head of the agency. In this case the agency was sued and under California law such agency can sue and be sued. Government Code §945; Art. 3, §5, Cal. Const.

In Papsan v. Allain, 106 S.Ct. 2932, 2941 (1986), this Court stated that "we

look to the substance rather than to the form of the relief sought." If suit would have been allowed had the head of the DMV been sued, then a suit against the DMV itself should have been allowed. This case is a good case to clear up the still remaining confusion which exists.

There are also valid and important "due process" arguments implicated by the State's tie-in ticket program with its registration.

ARGUMENT

I.

WHERE THE STATE ADMITTED IN ITS ANSWER, ITS BRIEF, ITS JOINT PRE-TRIAL STATEMENT, AND PARTICIPATED ON THE MERITS, THE STATE ENTERED A GENERAL APPEARANCE AND WAIVED ITS 11TH AMENDMENT IMMUNITY.

In Clark v. Barnard, 108 U.S. 436, 447, 448, 27 L.Ed. 780, 784, 785, 2 S.Ct.

878 (1883), this Court stated:

> "The immunity from suit belonging to a State. . . is a personal privilege which it may waive at pleasure; so that . . . its appearance in a court of the United States would be a voluntary submission to its jurisdiction."

Code of Civil Procedure section 1014 in California provides that,

> "A defendant appears in an action when he answers, demurs, files a notice of motion . . . gives the plaintiff written notice of appearance for him."

All of that has been done in this case. The Court of Appeals in this case was egregiously wrong in not finding a waiver by reason of a general appearance.

II.

SINCE ONLY INJUNCTIVE RELIEF AND DECLARATORY RELIEF WAS SOUGHT, SUIT COULD BE BROUGHT AGAINST THE STATE ACTING THROUGH ITS AGENCY (THE DMV).

It is fiction to say that suit could be brought against the head of the DMV but not the DMV itself which has the right to sue and be sued under California law.

The authorities have recognized suits against agencies as well as head of agencies. 36 CJS Fed. Cts. Injunctive Relief, §50(2), p. 257; Id. page 259, fn. 81; 36 CJS Fed. Cts. §50(1); 72 Am Jur.2d States Etc. §115, p. 504; School Board of City of Charlottesville Va. v. Allen, 240 F.2d 59, 63 (4th Cir. 1956); Great Lakes Inter-Tribal Council, Inc. v. Voight, 309 F.Supp. 60, 64 (WD Wis., 1970); Jones v. State of Mich, 525 F.Supp. 636, 638-9 (ED Mich. 1918) aff'd 705 F.2d 454 (5th Cir. 1982); Bashir v. Supreme Court of Ohio,

501 F.Supp. 288, 290 (SD Ohio W.D. 980), aff'd 652 F.2d 642 (6th Cir. 1981).

III.

A STATE CANNOT CONDITION REGISTRATION OF MOTOR VEHICLES UPON PAYMENT OF BAIL FOR TRAFFIC TICKETS.

If this could be done, then a state can prohibit a corporation from doing business until it pays its fines!

The Court of Appeals in United States v. Vertol, 545 F.2d 648, 651 (9th Cir. 1976) had stated that,

> "We refuse to extend this rule to empower other governmental agencies . . . to summarily take property as security for the eventuality that civil penalties must, in fact, be paid."

Refusing to register a vehicle is the same as seizing it. The practical effect is the same. The Seventh Circuit agreed in Sutton v. Milwaukee, 672 F.2d 644, 648

(7th Cir. 1982). The District Court said in Sutton, "[The State] may not, however, deprive a person of his or her car to insure payment [of tickets]." Sutton v. Milwaukee, 521 F.Supp. 733, 739 (ED Wis. 1981).

Yet that is exactly what happened here.

IV.

THE STATE SHOULD HAVE A PROCEDURE WHEREBY A CAR OWNER CAN EXPLAIN TO THE DMV THAT A TICKET HAS BEEN PAID, OR IS NOT HIS, ETC., IN ORDER TO GIVE THE PROCESS THAT IS DUE.

A person who receives notice that if he does not pay the list of tickets, he cannot renew his registration is under a Hobson's choice. If he takes the time to fight the tickets in the various courts in the State, he will most certainly be without registration, so he must pay the bail demanded.

CONCLUSION

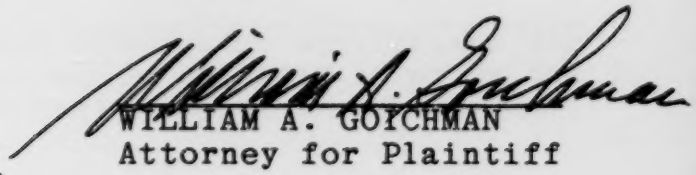
The Court of Appeals was egregiously wrong in finding immunity where the State sought none.

The case was fought and briefed by both parties as if there was no immunity. Some clarification in this field is necessary, if only to enlighten the Court of Appeals.

Secondly, the case presents substantial issues of substantive and procedural due process which were buried under the rug.

WHEREFORE, it is respectfully submitted so that plenary consideration can be given to the issues presented.

Respectfully submitted,



WILLIAM A. GOICHMAN
Attorney for Plaintiff

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

DANIEL GOICHMAN,	)	
	)	NO. 85-6193
Plaintiff-Appellant,	)	
	)	D.C. NO. CV 84-3971-RJK
v.	)	
	)	
DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, United States
District Judge, Presiding

Argued August 7, 1986, Pasadena
Submitted August 21, 1986

Before: ANDERSON, PREGERSON, and
REINHARDT, Circuit Judges

* This disposition is no appropriate for publication and may no be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

Appellant sued the Department of Motor Vehicles of the State of California for injunctive and declaratory relief. He sought to have certain sections of the California Vehicle Code declared unconstitutional. He also sought damages for monies paid to the Department pursuant to the allegedly unconstitutional statutes. Although the complaint sought relief on behalf of a class, the class action remedy was not pursued. The district court granted summary judgment to the defendant on the merits and then dismissed the complaint.

As the complaint states, "The Department is a branch of the Executive Department." In short, the Department of Motor Vehicles is a state agency.

The Eleventh Amendment bars suits against state-wide instrumentalities. This bar is applicable regardless of whether the relief sought is declaratory or injunctive on the one hand, or damages on the other. Shaw v. State of California Department of Alcoholic Beverage Control, 788 F.2d 600, 603-04 (9th Cir. 1986). California has not waived its general Eleventh Amendment immunity from suit in federal court. See Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142, 3147 (1985).

Moreover, the fact that the State initially appeared and defended this action on the merits in federal court does no constitute a constructive waiver of its Eleventh Amendment immunity. "The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one." Atascadero, 105 S. Ct. at 3147. Although

a state's immunity is a waivable "personal privilege", Clark v. Barnard, 108 U.S. 436, 447 (1883), "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Edelman v. Jordan, 415 U.S. 651, 673 (1974). It is clear that the Attorney General at first did not recognize the Eleventh Amendment issue in this case. The fact that the representatives of the State of California initially did not object to federal district court adjudication does not constitute clear and express consent to suit sufficient to overcome the immunity granted by the Eleventh Amendment. Cf. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984) ("[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.").

Accordingly, we are not free to reach the merits of the action.[1] Rather, the complaint must be dismissed. Therefore, we affirm the district court's dismissal of the complaint, although on a different ground.

AFFIRMED

FOOTNOTE

1. We note that were we to do so we would almost certainly find little merit to appellant's position.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DANIEL GOICHMAN, on behalf of himself and a class of all persons similarly situated, Plaintiff, v. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, Defendant.	No. CV 84-3971-RJK ORDER AND JUDGMENT

A motion was made before this Court on July 29, 1985 for summary judgment in favor of defendant, with William Goichman appearing as attorney for plaintiff and John J. Crimmins appearing for defendant. The Court has considered the pleadings, affidavits and exhibits, has heard arguments, has examined the briefs which were submitted with regard to such motion, and having found that there is no genuine issue as to any material fact and that the facts are as set forth in the Statements

of Uncontroverted Facts as set forth in the documents of that caption as filed herein, and that the defendant is entitled to prevail as a matter of law.

IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's complaint be dismissed and that defendant recover from plaintiff the sum of $_____ in costs and disbursements, as taxed.

The Clerk shall send, by United States mail, a copy of this Order and Judgment to counsel for the parties.

DATED: July 30, 1985.

ROBERT J. KELLEHER
ROBERT J. KELLEHER
Senior District Judge